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14
15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN JOSE DIVISION**

18 UNITED STATES,

19 Plaintiff,

20 vs.

21 MELVIN SHIELDS, MICHAEL SIMS, SAM
22 STAFFORD,

23 Defendants.

Case No.: CR 12-00410 RMW

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS**

Date: Monday, September 30, 2013
Time: 9:00 a.m.

Before the Honorable Judge Whyte

24
25 The defendants have filed a constitutional motion intended to protect their rights to due
26 process, a fair trial, and effective representation of counsel. Contrary to the view taken in the
27 government's opposition, this is not a discovery motion. Moreover, the defendants' constitutional
28

1 rights must be considered in the context of this specific case. In this case, at this time, the
2 government still has not adequately informed the defendants of the charges made by the Grand
3 Jury, and from its own filings does not appear to be prepared to bring the defendants to trial on
4 those charges. This makes it impossible for counsel to investigate this case and effectively
5 prepare for trial. Therefore, the defendants continue to request that the Court dismiss the
6 indictment(s) without prejudice.¹ In the alternative, the defendants would request that the trial
7 date be vacated and no new trial date be scheduled until both the government and the defendants
8 are prepared to proceed.²

11 **I. An Unfair Reading of the Court's Order**

12 The government argues that it complied with the Court's Order for it to provide
13 defendants with a Witness List and Exhibit List 60 days in advance of trial notwithstanding the
14 fact that (1) it failed to identify by name two dozen witnesses; and (2) it only preliminarily
15 identified possible summary witnesses. Presumably, these summary witnesses will testify
16 regarding at least the 14,493 financial documents included on the Exhibit List. Given the fact that
17 the defendants did in fact place investor money and bank money in real estate investments, their
18

19
20 ¹ Since the defendants filed their motion to dismiss on September 16, 2013, the
21 government has filed a Superseding Indictment in this matter. As discussed below, the
22 Superseding Indictment does not resolve the problems addressed by the defendants' motion to
dismiss, and like the original indictment in this case it too should be dismissed without prejudice.

23 ² If the Court is concerned about the time or money being expended by the defendants in
24 preparation for trial, the defendants would certainly welcome the appointment of an impartial
25 referee who is familiar with the constitutional requirements for the effective preparation of
26 counsel, and who could report back to the Court regarding the significant time and effort that
27 defendant counsel are putting into this case – and the significant time and resources that could be
28 saved if the government were to provide defense counsel with (1) witness contact information,
and (2) timely and well documented summary documents and expert disclosures.

1 testimony will be the cornerstone of the government's fraud allegation.

2 Additionally, the government (3) continues to refuse to disclose whether the summary
3 witness will be presented as an expert witness; and (4) has neither created³ nor provided the
4 defense with the Exhibits that the summary witness will rely upon.

5 Moreover, (5) the government provided the defense over 165 pages of documents listed
6 on the Exhibit List several days after the Exhibit List was filed. These documents (6) included
7 five alleged "Actual Invoice[s]" that had not previously been provided to defense counsel and
8 appear to be central to counts of Bank Fraud and Making False Statements to a Bank, as well as
9 the overarching Conspiracy charge. Dkt. 122, Cts. 1, 22, 29.

10 (7) The government has even filed a superseding indictment since providing the Witness
11 List and Exhibit List that charges new crimes and expands the list of investors.⁴

12 The government's insistence that it has complied with the Court's Order is an unfair
13 reading of the Court's Order. The government's lists are works-in-progress.

14 The defendants understand that plans and trial strategy can change in the lead-up to trial,
15 and the Court's Order likely left room for the government to file an amended witness list or
16 exhibit list. However, the government should have undertaken a serious effort to finalize the lists
17 by the August 26 deadline.

18 Given the complexity of this case, the financial hurdles that defense counsel must pass
19 through to investigate the case or analyze financial documents, and the burden of working with
20 the Marshal Service (issues discussed below), the defendants required and continue to require the

21 ³ See Dkt. 124 at 16 (explaining that the government "will provide such charts (including
22 the references to the support for such charts) as soon as practicable."

23 ⁴ In addition, it has taken the government a month to respond to discovery requests
24 propounded two months before trial.

1 full sixty days' notice ordered by the Court.

2
3 **II. Issues Relating to CJA Funding and Marshals Service are Critical.**

4 The government argues both that issues regarding CJA funding "are irrelevant," and that
5 "[t]he protocol of the CJA and the Marshal . . . provide a workable means for the defendants to
6 ensure effective preparation in advance of trial." Dkt. 124, at 17-18.

7
8 At the same time, the government essentially argues that the defendants should begin trial
9 before they are prepared. *See* Dkt 124 at 18 ("As the United States has previously indicated that
10 it expects its case-in-chief to take at least a month, at minimum, the defendants in reality have
11 somewhere at least 60 days before they would be calling witnesses in their case-in-chief.").

12 To begin trial before being prepared means that the defendants risk foregoing either their
13 right to present an opening statements before the prosecution presents its case in chief, or
14 foregoing their right to effective assistance of counsel. *See Saesee v. McDonald*, -- F.3d --, 2013
15 WL 3970091, * 3 (9th Cir. Aug. 5, 2013) (explaining that defense counsel's promises to the jury in
16 opening statement about witnesses appearing can be IAC when they are not fulfilled). As
17 explained in the defendants' opening brief, defense counsel is constitutionally required to
18 complete his or her investigation before trial. *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968);
19 *see also* ABA Standard 4-5.1(a) & 5-6.1(b). If unprepared for trial, he or she must seek to
20 withdraw. *See* ABA Standard 4-8.6(c).

21
22 The government also ignores clearly established law requiring the defendants to conduct
23 their own investigation into the government's case rather than relying on government documents.
24 *Alcala v. Woodford*, 334 F.3d 862, 891-92 (9th Cir. 2003) (citing *Rios v. Rocha*, 299 F.3d 796
25 (9th Cir. 2002)).
26
27
28

1 Issues relating to CJA funding and the Marshals Service are critical in this case. Federal
2 Rule of Evidence 1006 requires the government to provide summary charts “at a reasonable time
3 and place,” meaning early enough “that the opposing party has adequate time to examine the
4 records to check the accuracy of the summary.” *United States v. Rangel*, 350 F.3d 648, 651 (7th
5 Cir. 2003). Thus, the government’s disclosure duty necessarily requires the government to
6 acknowledge the procedural hurdles that the defendants are required to step through in order to
7 check the accuracy of the summary. In this case, that means obtaining the summary charts,
8 obtaining an estimate from the consulting expert for the project, applying for and obtaining funds
9 from the Court for the project, and having the expert perform the necessary analysis before trial.⁵
10

11 Moreover, the practical reality of subpoenaing witnesses to testify in this case involves
12 obtaining the witness’s exact location, and giving the Marshals Service 30 days to serve the
13 witnesses, again before trial. Investigator funding in this case has been limited, and at least one
14 defense investigator has been ordered to make contact with potential witnesses by phone only. It
15 is the defendants’ position that the government is required to provide defense counsel with the
16 contact information in the government’s possession. The government is within its rights to argue
17 against this, but must recognize the practical results of refusing to provide defendants with this
18 contact information – just as the Court should consider these practical realities when deciding
19 how to resolve the issues presented in this case and in this motion.
20
21

22 The government’s duties go beyond those set out in Rule 16, the Jencks Act, and *Brady*.
23 “The duty of the prosecutor is to seek justice, not merely to convict.” ABA Standards 3-1.2(c).
24 “It is an important function of the prosecutor to seek to reform and improve the administration of
25

26 ⁵ Defense counsel has attempted to get an estimate for this work and applied to the Court
27 for funding based on the little information available to defense counsel at this time. That funding
28 application remains pending.

1 criminal justice. When inadequacies or injustices in the substantive or procedural law come to the
 2 prosecutor's attention, he or she should stimulate efforts for remedial action.” ABA Standards 3-
 3 1.2(d).

4 The government may disclaim any responsibility for the inadequacies in the system, but
 5 the government nonetheless retains a duty to help the defendants mitigate these issues so that the
 6 defendants receive a fair trial.⁶ Absent efforts by the government to work with defense counsel to
 7 mitigate the inadequacies of the system, the responsibility to do so falls to the Court.
 8

9 10 **III. Has This Case Ever Really Been Narrowed?**

11 The government continues to argue that this case is clearly circumscribed without (1)
 12 disclaiming reliance on overbroad language that continues to be included in its Superseding
 13

14 ⁶ The government cites *United States v. Gatewood*, 2012 WL 2286999 (D. Ariz. June 18,
 15 2012) in support of its position that logistical problems do not entitle a defendant to unredacted
 16 discovery. In *Gatewood*, the government was

17 unwilling to give the defense unredacted discovery because “[t]he victims in this
 18 case have alleged that they have been raped by the defendant,” “many of the
 19 victims are scared of the defendant,” and “recent investigation has revealed that
 20 friends and family of the defendant have been contacting several victims and
 witnesses ... [and] attempting to intimidate them and keep them from
 cooperating.”

21 *Id.* at * 1. Moreover, the government in *Gatewood* went “so far as to contact witnesses and
 22 victims on behalf of Defendant regarding requests for interviews” and provided them with
 23 “requested criminal histories.” *Id.* at * 1-* 2. And the court faulted the defendant for not
 24 providing a justification for requesting the redacted information beyond stating that he “seeks to
 research the criminal and public records of the witnesses and victims.”

25 Here, the defendants are attempting to contact and potentially subpoena alleged victims of
 26 financial fraud, and other witnesses, located throughout the country. This is directly connected to
 27 the defendants’ need for the contact information. And the defendants have described exactly what
 28 the logistical hurdles are that justify the claim in this case.

1 Indictment, or (2) disclaiming an intention to prove criminal liability in reliance on alleged
2 investments and investors not listed in the Superseding Indictment.

3 Even with the filing of the Superseding Indictment, the defendants continue to face an
4 indictment that relies on such phrases as “one or more of several,” “including but not limited to,”
5 and “among other things.”
6

7 Additionally the Superseding Indictment lists four investors who were not included in the
8 initial Indictment or the Bill of Particulars.⁷

9 The government argues that the Witness List narrowed the case because it shows that the
10 government has decided not to call as witnesses 25 of the investors listed on the Bill of
11 Particulars. *See, e.g.*, Dkt 124 at 9 (“The witness list makes clear that the United States is **not**
12 seeking or intending to call all of the victims previously on its Bill of Particulars.”). However, at
13 no point has the government disclaimed its intention to rely on representations allegedly made to
14 these investors, or the transactions allegedly undertaken with these investors, in its case in chief.
15 Rather, it still intends to prove that the defendants were responsible for a “\$21 million investment
16 fraud scheme” – which includes all of the money from all of the investors. *See* Dkt. 124 at 17.
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18

19 **IV. Recognition of the Complexity of this Case**

20 Interestingly, in at least part of its opposition brief, the Government has finally recognized
21 the complexity of this case. In order to justify the extensive Witness List, and the presence of
22 19,366 pages of documents on its Exhibit List, the government states that:
23

24 This is not the prototypical investment fraud indictment involving a single
25 investment scheme, pitched to a discrete group of investors at one time and in one
26 place. The conspiracy alleged here encompasses a series of distinct investment

27 ⁷ Defense counsel recognizes that these four investors are spouses of investors previously listed.
28

1 projects, in different locations, and involving different individuals. While some
2 victims did invest in multiple projects with the defendants, others invested in only
3 a single investment project. Certain documents describing those events may be
4 relevant to only that aspect of the indictment. Instead, the United States will be
5 presenting evidence of series of transactions involving the defendants and
6 drawing on witnesses from California, North Carolina, Texas, Florida and
elsewhere. The number of witnesses and potential exhibits, therefore, is likely to
be more numerous than a typical fraud trial.

7 Dkt. 124 at 9.

8 This is the very argument that the defendants have been making from the outset. This
9 case is not a typical fraud case. The charges encompass multiple discrete projects, in multiple
10 states, over a significant time period.

11 But then, to distinguish the case from *W.R. Grace*, the government makes an about face
12 and states that “[t]he case at hand is not unusually large or complex. The volume of discovery
13 (35,000 pages) is relatively small for this type of investment fraud case.” Dkt. 124 at 11.

14 *W.R. Grace* stands for the proposition that the District Court is empowered to control its
15 docket by issuing pretrial orders that are appropriate to the case, taking into account that case’s
16 complexity, the actions of the government, and the rights of the defendants. That is what the
17 defendants have asked for in this case, time and again. Throughout, the government has resisted
18 the defendants’ efforts to understand the charges against them, and the moderate remedies
19 provided by the Court.
20
21

22 **V. Conclusion**

23 As this case stands, the government still has not adequately informed the defendants of the
24 charges made by the Grand Jury, and from its own filings does not appear to be prepared to bring
25 the defendants to trial on those charges. This makes it impossible for counsel to investigate this
26 case and prepare effectively for trial.
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1 It is counsel's belief that the moderate remedies provided by the Court thus far have failed
2 to rectify the serious constitutional problems in this case. Therefore , the defendants continue to
3 request that the Court dismiss the indictments without prejudice.

4 In the alternative, the defendants would request that the trial date be vacated and no new
5 trial date be scheduled until the defense counsel is able to state, on the record, that they have
6 fulfilled their pretrial constitutional obligations to the best of their ability; or until an impartial
7 referee has determined that they have done so. Else, the Court may be put into the position of
8 having to relieve counsel based on counsel's belief that they have failed to fulfill their pretrial
9 obligations under the constitution of the United States.
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14 Respectfully submitted,

15
16 Dated: September 27, 2013

NOLAN, ARMSTRONG & BARTON LLP

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18 By /s

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20 Attorney for Defendant
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22 Dated: September 27, 2013

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1 Dated: September 27, 2013

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